Filed 3/29/16 City & County of San Francisco v. Price CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CITY & COUNTY OF SAN FRANCISCO, Petitioner, v. GREG PRICE, Respondent; JULIE HENDRICKSON, Appellant.	A139024 (San Francisco County Super. Ct. No. FCS-95-064177)

Appellant Julie Hendrickson (Hendrickson), the mother of two children by Respondent Greg Price (Price), appeals from a postjudgment order that she pay Price's attorney fees in the amount of $1,200, as sanctions for her refusal to comply with orders made by the family court.

Finding no error by the family court, we will affirm the sanctions order.

FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises in a case that began in 1995, with the filing of a complaint by the City and County of San Francisco to establish Price's parental relationship and responsibility for child support, apparently in connection with Hendrickson's then-unborn child. In the 1990's a judgment was entered, and various post-judgment custody and

support issues were litigated, including issues related to Price and Hendrickson's second child, who was born in 1998. The Register of Actions shows no activity from 2001 until 2011. By 2011, Hendrickson and the two children were living in Los Angeles County, and Price had not seen the children for more than 10 years.

In April 2011, Price filed an order to show cause for custody and visitation, supported by his declaration that Hendrickson denied him the right to see his children and that he would like to interact with them and show them he did not abandon them.[1] Price's filing led to a series of further filings, orders, and hearings, which eventually led to the sanctions order that is at issue here.

In November 2011, the family court instructed the parties to pursue counseling that could result in reuniting the children with their father. By August 2012, little progress had been made. At a hearing that month, Hendrickson's attorney asserted that the children were not interested in reunification. The family court acknowledged that Hendrickson could not force them to participate, but noted her "obligation not to put barriers in th[e] process." The family court instructed the parties to identify their choices for a reunification counselor, established a procedure for the appointment of a counselor by early October 2012, ordered the parties to cooperate with the professional who was appointed, and set a hearing for November 2012 at which the parties were to update the court.

No counselor had been appointed by the time of the November hearing. At that hearing, the parties reached an agreement to use a particular counselor in the Los Angeles area, and the court appointed him to advise on alienation and reunification of the children

[1] Hendrickson contends that Price abused her and the children in the 1990's; she was granted full custody in the late 1990's; the court ordered supervised visits with the children for Price; he stopped visiting in 1999; he refused to support the children; and in 2011 Child Support Services of Los Angeles County located him and garnished his wages to force him to pay support. The record shows that a notice of registration of a support order from Los Angeles County was filed in the San Francisco Superior Court in early 2011; apparently Price's wages were garnished shortly thereafter. Hendrickson contends that Price filed for custody in retaliation and to avoid child support.

with Price. Hendrickson's attorney then informed the family court that Hendrickson would be seeking to change venue to Los Angeles. The family court stated that it would not be inclined to grant such a motion unless there had been progress on the reunification, and set a February 2013 hearing date for a progress report on the counselor's evaluation.

At the February hearing, Price's attorney reported that Hendrickson had not contacted the counselor "until apparently the last two days." The family court was informed that the counselor required the parties to sign a document describing his process and policies before any appointments could be scheduled, and then continued the matter to March, ordering that by then both parties were to have signed the document, Hendrickson was to have met with the counselor, and Price was to have met with the counselor or at least scheduled an appointment.

At the March hearing, which was not reported, the parties agreed to continue the hearing to April, because Hendrickson had not yet complied with the February order.

At the April hearing, the family court asked for an update. By then, Price's request for custody and visitation had been pending for two years, and the only progress that had been made was the appointment of a reunification counselor. Hendrickson had still not complied with the family court's February order to have an initial appointment with the counselor. She had made an appointment for the day before the hearing, but had rescheduled it at the last minute because the older of her two children with Price would not accompany her. Yet there was no indication that the child was required to attend the appointment. The family court noted that Hendrickson had refused to participate in the court-ordered counseling process, and that she had not complied with specific orders made by the court in February, even after a continuance had been granted in March.

Price's attorney asked the family court to impose a sanction to encourage Hendrickson to comply with court orders, and suggested that Hendrickson pay his fees for court appearances when Hendrickson failed to appear and had not complied with the

court's orders.[2] The family court asked Price's attorney to come back later during the session to say how much he was requesting, and how the amount was calculated.

When the matter was recalled, Price asked for an hour's fee, at $300, for his appearance in March, when it had been represented that Hendrickson was proceeding with her responsibilities, and three hours' fees for his time that day. Hendrickson's counsel objected that there had been no notice in advance of the hearing, and the court responded that sanctions had been requested before the matter had been passed earlier in the session and that there was no requirement of a noticed motion.

Finding that Hendrickson willfully refused to follow its order, the family court ordered her to pay Price's counsel $1,200, representing four hours of time at $300 per hour, in monthly installments of $200. The family court instructed Price's attorney to prepare the written order, which was filed on May 7, 2013.

This appeal timely followed.[3] No respondent's brief was filed.

---

[2] Price had not filed a motion for sanctions, and earlier in the hearing he had disclaimed any request for sanctions. Asked by the court what his client wanted, Price's counsel replied, "Visitation. Your honor, we are not looking for sanctions. We are not looking to file a contempt citation. We are trying to get Mr. Price together with his children. We have been in this court for two years now. Every time, your honor, the last time we were here I asked you to set the—today's hearing date as early as we could, because I was afraid this was going to happen. And sure enough, last week I get a request that we continue today's hearing notwithstanding the fact that Mr. Price already had his appointment made. And they asked to continue this hearing, which is just delay and delay." Later in the hearing, in response to the court's statement that it was not in the position to order visitation, Price's counsel said, "When you asked me what I wanted, I didn't mean I am looking for that order today. This is what we have been trying to do for two years—." The court again asked Price's counsel what he wanted, and at that point he asked for sanctions.

[3] The Notice of Appeal refers to the family court's sanctions order and to an order that counsel be appointed for Price and Hendrickson's children. Hendrickson's brief addresses only the sanctions order.

DISCUSSION

A. *Hendrickson's Motion to Augment the Record*

Two months after Hendrickson filed her opening brief, she moved to augment the record to include 10 exhibits.[4] The motion was unopposed. We reviewed the motion and exhibits in light of California Rules of Court, rule 8.155(a)(1)(A), which authorizes us to augment the record to include "[a]ny document filed or lodged in the case in superior court." At our request, Hendrickson filed a declaration indicating where in the Register of Actions the documents had been filed, and explaining the relevance of the documents.

Based on Hendrickson's declaration and our review of the documents and the Register of Actions, we grant the motion to augment the record as to Exhibits 1, 3, 4, and 11, pages 6 and 7 of Exhibit 2:A, and page 2 of Exhibit 9. We deny the motion as to Exhibits 5, and 7, and the remainder of Exhibits 2 and 9, because there is no indication as to when or whether these documents were lodged or filed with the San Francisco Superior Court in the underlying action. We deny the motion as to Exhibits 6 and 10, which are already included in the Clerk's Transcript as part of the Register of Actions.[5]

B. *Hendrickson's Appeal of the Sanctions Order*

In the absence of a respondent's brief, we decide the appeal on the record and opening brief. (Cal. Rules of Court, rule 8.220(a)(2).) We presume that the challenged order is correct, and "all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (*Arceneaux*).) As appellant, Hendrickson has the burden to affirmatively demonstrate error, even though no respondent's brief has been filed. (*Kriegler v. Eichler Homes, Inc.* (1969) 269 Cal.App.2d 224, 226-227.)

---

[4] Hendrickson numbered the exhibits 1 through 11, with exhibit 8 intentionally omitted.

[5] Our analysis and conclusions as to sanctions would not change if we augmented the record to include all the exhibits Hendrickson submitted.

1. *Applicable Law and Standard of Review*

The Family Court did not specify the statutory basis for its sanctions order. Hendrickson presumes that the order was issued pursuant to Family Code[6] section 271, and we agree. The family court was clear that it was imposing sanctions because Hendrickson refused to participate in the court-ordered counseling process and willfully refused to follow the court's orders. Section 271 authorizes the family court to award attorney's fees and costs based "on the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys." (§ 271, subd. (a).) Such an award is "in the nature of a sanction." (*Ibid.*) The requesting party "is not required to demonstrate any financial need for the award," but the award shall not impose "an unreasonable financial burden on the party against whom the sanction is imposed." (*Ibid.*)

"Whether to impose sanctions and the amount thereof is addressed to the trial court's sound discretion." (*In re Marriage of Greenberg* (2011) 194 Cal.App.4th 1095, 1100.) " ' "[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order . . . ." [Citations.]' (*In re Marriage of Daniels* (1993) 19 Cal.App.4th 1102, 1106.)" (*In re Marriage of Burgard* (1999) 72 Cal.App.4th 74, 82.) "Inherent in our review of the exercise of discretion in imposing monetary sanctions is a consideration of whether the court's imposition of sanctions was a violation of due process." (*Moyal v. Lanphear* (1989) 208 Cal.App.3d 491, 501.)

2. *Analysis*

Hendrickson argues that the imposition of sanctions violates her due process rights, that the family court failed to comply with the statutory requirements of sections 270 and 271 regarding her ability to pay, and that there is not substantial evidence to

[6] All statutory references are to the Family Code unless otherwise specified.

support the family court's finding that she willfully violated the court's orders. We address her arguments in turn.

a. *Due Process*

"As a *sanction*, [section] 271 awards are subject to the same due process prerequisites governing other sanctions assessments [citation]: An award of fees and costs as a sanction pursuant to [section] 271 'shall be imposed only after *notice to the party* against whom the sanction is to be imposed and *opportunity for that party to be heard*.' " (Hogoboom et al., Cal. Practice Guide: Family Law (The Rutter Group 2015) ¶ 14:265, p. 14-91 (Hogoboom).)

Price did not request sanctions until after the April 2013 hearing had begun, and initially stated he was not seeking sanctions. On that basis, Hendrickson contends that her due process rights were violated because the family court imposed section 271 sanctions without a noticed motion hearing. We disagree.

Section 271 does not specify the form of notice to be provided. (*In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1529 (*Davenport*).) The only procedural requirement for sanctions under section 271 is notice to the party and an opportunity to be heard. (Hogoboom, *supra*, ¶ 14:117, p. 14-41.) Due process does not necessarily require that a motion for sanctions be heard at a formally noticed sanctions hearing. (*Ibid.*) "The adequacy of notice . . . is not measured by an arbitrary number of days but, rather, should be determined on a case-by-case basis in light of the circumstances giving rise to the sanctions and the amount of the penalty at stake." (*Ibid.*, citing *In re Marriage of Quinlan* (1989) 209 Cal.App.3d 1417, 1422-1423 (*Quinlan*).)

Where the substantive basis for sanctions is narrow, the amount of the request is small, the need to prepare a defense is minimal, and no request for a separate hearing is made, due process is satisfied if the moving party gives clear warning of the grounds for sanctions and counsel is given an adequate opportunity to present an oral response. (*Quinlan*, *supra*, 209 Cal.App.3d at p. 1423.) "[A] sanctions hearing on a separate and later date is often unnecessary." (*Ibid.*) That is the situation here.

Hendrickson's attorney was present throughout the April 2013 hearing. He conceded that Hendrickson had not obeyed the court's February order. His excuse was that Hendrickson's child had refused to attend Hendrickson's appointment with the counselor, even though the February order applied only to Hendrickson, and there was no indication that the child was required to attend the appointment. Then, Price's attorney asked for sanctions in the form of attorney's fees for his court appearances when Hendrickson failed to appear in court and failed to comply with court orders as a way of addressing Hendrickson's persistent refusal to comply with the court's February 2013 order. The family court passed the matter, asking Price's attorney to return when the matter was recalled with details about how much he wanted, and he did so. Hendrickson's attorney was heard as to the adequacy of notice, and Hendrickson's ability to pay.

We see no violation here of Hendrickson's due process rights.

b. *Compliance with Sections 270 and 271*

Section 270 requires that before a party is ordered to pay attorney's fees pursuant to section 271, the family court must "determine that the party has or is reasonably likely to have the ability to pay." Section 271, subdivision (a) provides that an award under that section must not "impose[ ] an unreasonable financial burden on the party against whom the sanction is imposed."

The statute does not require an explicit statement on the record as to Hendrickson's ability to pay or the reasonableness of the burden of the sanction, and we presume that the family court followed the law and made the appropriate determinations based on the record that was before it. This follows from the principles of appellate review: the order is presumed correct; presumptions are indulged in favor of correctness; and Hendrickson as appellant must affirmatively show error. (*Arceneaux*, *supra*, 51 Cal.3d at p. 1133.) Hendrickson contends that the family court should have referred to her November 2012 income and expense declaration; because the record is silent as to that declaration, Hendrickson infers that the court did not review it. But Hendrickson misunderstands the appellate process: it is well-settled that "[a]ll intendments and

presumptions are indulged to support" the trial court's order "on matters as to which the record is silent." (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898.) Therefore, the fact that the family court did not mention Hendrickson's income and expense declaration does not support the conclusion that the declaration was ignored. Moreover, the record reflects that the family court was made aware at the hearing that Hendrickson was on a fixed income. And the income and expense declaration shows that Hendrickson was paying her own attorney $300 per hour, the same amount that Price's attorney was charging. In the family court's extension of the sanctions payment over six months, with $200 to be paid per month, we see evidence of the court's determination, as required by section 270 and section 271, subdivision (a), that Hendrickson was able to pay the sanction as imposed, and that the sanctions did not represent an unreasonable burden on her.

Hendrickson provides no citations to the record to support her argument that she is unable to pay because she is physically disabled, and accordingly we reject it. (*Williams v. Williams* (1971) 14 Cal.App.3d 560, 565 ["It is incumbent upon the parties to an appeal to cite the particular portion of the record supporting each assertion made."].) We also reject Hendrickson's argument that the amount of the sanction is excessive. That argument rests on her contention that Price has the ability to pay his own fees, in disregard of section 271, subdivision (a), which states plainly that "the party requesting an award of attorney's fees . . . is not required to demonstrate any financial need for the award."

We conclude that Hendrickson has not shown that the family court failed to comply with the statutory requirements as to determining Hendrickson's ability to pay and the reasonableness of the burden imposed on her.

c. *Substantial Evidence to Support the Court's Findings*

Hendrickson contends there was not substantial evidence to support the family court's implicit finding that she had the ability to comply "with the order to make her son go to the therapist appointment," or its finding that she willfully violated that order. But Hendrickson mischaracterizes the family court's order and the reason for the imposition

of sanctions. She can point to nothing in the record to suggest that she was ever ordered to make her son go to the therapist. Rather, the family court ordered Hendrickson to make an appointment for herself with the counselor for initial intake, and attend the appointment.

Because Hendrickson contends that substantial evidence does not sustain the family court's findings, she is required to set forth in her brief all the material evidence on the point, and not merely her own evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881. Because Hendrickson has not done this, she has forfeited her claim of error. (*Ibid.*) Hendrickson's brief says nothing about the hearings at which a counselor was appointed, nothing about the family court's February order or the hearing at which it was made, and nothing about the March continuance. Instead, she says, with no citation to the record, that she "has been very cooperative with the court." The record shows otherwise.

Even if Hendrickson had not forfeited the issue, we would reject her argument. In a review under the substantial evidence standard, we consider all evidence in the light most favorable to the court's order. (*Davenport, supra,* 194 Cal.App.4th at p. 1530.) Here, the evidence supports the family court's findings that Hendrickson was not participating in the process mandated by the family court and willfully refused to follow the court's order: In November 2012, the family court identified a counselor whom Hendrickson was instructed to contact. No contact was made until two days before a February 2013 review hearing. At that hearing, Hendrickson was ordered to meet with the counselor before the next review hearing, set for March. The hearing was continued because Hendrickson had not complied with the order. The review hearing was continued to April 2013. Hendrickson made an appointment for the day before the review hearing and failed to attend it. Hendrickson provided no documentation to justify her failure to comply with the court's orders.

In sum, we conclude that Hendrickson has not shown that the family court abused its discretion in ordering her to pay $1,200 in sanctions.

DISPOSITION

Hendrickson's motion to augment the record is granted with respect to Exhibits 1, 3, 4, and 11, pages 6 and 7 of Exhibit 2:A, and page 2 of Exhibit 9; the motion is denied with respect to the other exhibits.

The May 7, 2013 order imposing sanctions is affirmed.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.